BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARY L. SHORT	)	
Claimant	)	
VS.	)	
	)	Docket No. 210,203
LINCOLN PROPERTY COMPANY	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant, respondent and its insurance carrier all appealed the March 15, 2004 Award entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Appeals Board (Board) heard oral argument on September 14, 2004. The Director appointed Jeffrey K. Cooper as Appeals Board Member Pro Tem to serve in place of Board Member Julie A. N. Sample who recused herself from this case.

APPEARANCES

Mark E. Kolich, of Lenexa, Kansas, appeared for claimant. James K. Blickhan, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

ISSUES

Claimant alleges she was compelled to leave her job with respondent and is now permanently and totally disabled due to an occupational disease. In the alternative, claimant alleges she suffered a series of accidents that arose out of and in the course of her employment with respondent. Claimant's application for hearing alleged her "date of accident or disease" as "continuous exposure up and through April 11, 1995" as a result

of her being "exposed to noxious chemicals and cleaning agents."[1] At the regular hearing, it was clarified that claimant alleges dates of accident or occupational disease from her work-related exposure to chemicals from May of 1988 through August of 1995.[2]

The ALJ found claimant's condition compensable and further found that it should be treated as an injury by accident rather than an occupational disease. "The evidence indicates that the claimant's asthma was at least aggravated or accelerated by exposure to the cleaning solution fumes. Therefore, it is held that the claimant did suffer an injury arising out of and in the course of employment."[3] The ALJ also found claimant gave timely notice of her accident and, based upon an accident date of April 11, 1995, found that written claim was timely made. The ALJ found claimant's functional impairment to be 20 percent to the body as a whole. The ALJ entered an award for a 51.5 percent permanent partial disability based upon the average of claimant's 50 percent wage loss and 53 percent task loss. Although claimant is not working and, therefore, her actual wage loss is 100 percent, the ALJ found that claimant failed to make a good faith effort to find appropriate employment post-accident. Accordingly, a wage was imputed based upon claimant's ability to earn wages. The claimant missed more than one week of work due to the injury because she was forced to permanently leave her job with respondent. Accordingly, the ALJ found that the *Boucher* defense does not apply.[4] The ALJ found "respondent is liable for reasonable and necessary medical treatment of the claimant's asthma, both in the past and in the future."[5] However, the ALJ added that the "exception is any expense for injections of anti-IgE antibody. . . it is held that injections of anti-IgE antibody, or Xolair, is not a reasonable and necessary treatment of the claimant's asthma."[6] Claimant disputes this finding.

Respondent denies that claimant met with personal injury by accident or suffered an occupational disease and further denies that any such injuries or condition she may have arose out of and in the course of her employment. Respondent further denies notice, timely written claim and claimant's entitlement to past and future medical compensation. Respondent denies that claimant is permanently disabled and alleges her claim for permanent disability compensation is barred because she failed to miss at least one week of work due to the injury.

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[1] K-WC E-1 Application for Hearing (filed Feb. 13, 1996).

[2] R.H. Trans. at 4 (Nov. 21, 2002).

[3] Award at 4 (March 15, 2004).

[4] *Boucher v. Peerless Products, Inc.*, 21 Kan. App. 2d 977, 911 P. 2d 198 (1996).

[5] Award at 6 (March 15, 2004).

[6] *Id.*

Accordingly, the issues for the Board's review are:

1. Whether claimant met with personal injury by accident [or] occupational disease;

2. Whether claimant's accidental injury [or] occupational disease arose out of and in the course of employment with respondent;

3. Whether respondent was provided with timely notice of the accidental injury [or] occupational disease;

4. Whether written claim was timely made;

5. Whether claimant is entitled [to] payment of medical expenses incurred to treat her injury [or] disease;

6. The nature and extent of claimant's impairment resulting from her accidental injury [or] occupational disease;

7. Whether claimant's claim for impairment [or] disability is barred by Kansas law as expressed in the *Boucher* case;

8. Whether claimant is entitled to unauthorized medical; and

9. Whether claimant is entitled to future medical treatment.[7]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that the ALJ's Award should be modified as to the claimant's ability to earn wages post-injury, but the Award should otherwise be affirmed. The Board concludes that claimant's permanent partial disability award should be limited to her percentage of functional impairment because she retains the ability to earn at least 90 percent of the average weekly wage she was earning at the time of her accidental injury. The Board otherwise adopts the findings, conclusions and orders contained in the ALJ's Award.

At the time of her December 18, 2003 deposition, claimant was 60 years old and unemployed. Claimant testified that she was hired by respondent May 12, 1988. Respondent is the owner of an apartment complex in Johnson County, Kansas. Her job duties were to clean apartments and the club house. Claimant said her symptoms started soon after she started working, "I started to dry-hack and I had a burning in my throat and then that's what is the matter with my voice and the rib cage and down the center here

[7] *Id.* at 2 and 3.

(indicating). My hands tingle and are pebbly and up in my arms, like little tiny pebbles like cat litter."[8]

Claimant related her symptoms to the use of a cleaning solutions.

> Q. (Mr. Kolich) Did you have something happen to you involving some lacquer thinner?
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> A. (Mary Short) That was what I was using and that's where the numbness and - - I could taste it too 24 hours a day.
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> Q. When were you working with the lacquer thinner?
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> A. About two or three days after I started in May of '88.[9]

When claimant began working for respondent the apartments were newly constructed. The lacquer thinner was used to remove paint from counters, floors, cabinets, etc., where the paint had been over sprayed or spilled. She described using the lacquer thinner for an eight-hour period every day in poorly ventilated apartments. Claimant testified that she reported to her supervisor, George Grantham, that the lacquer thinner was causing her breathing problems. Claimant indicated that she stopped using the lacquer thinner by July or August of 1988. Thereafter, she began using other products, including Clorox bleach and ammonia to clean. Approximately October or November 1989, she was diagnosed with asthma.

Claimant denies having breathing problems before coming to work for respondent. She acknowledged having occasional bronchitis and perhaps pneumonia but said that these always responded to treatment. She was never diagnosed as having asthma before working for respondent. Likewise, she never had symptoms similar to what she is experiencing now before working for respondent.

Beginning sometime during the summer of 1989 claimant was using bleach on a regular basis, at least seven hours a day, five days a week. She continued having breathing problems and a dry, scratchy throat, which was painful. She noticed that her symptoms subsided over the weekends when she was not working.

Claimant first sought medical treatment with a Dr. Ramirez at the UrgentCare facility at the Oak Park Mall in the fall of 1989. In the spring of 1990 she saw a pulmonary specialist, Dr. Rodney Hill. Claimant treated with Dr. Hill until 1992 when she was referred by Dr. Hill to Dr. Prendes, a general practitioner.

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[8] Short Depo. at 5.

[9] *Id*. at 6.

When Sherri Farris became manager in 1991, claimant complained to her about her symptoms and was instructed to stop using the bleach. Thereafter her breathing problems "got a lot better."[10]

In 1993, the manager instructed her to again use a bleach type cleaner whereupon claimant's symptoms returned. "I started the same symptoms. I had trouble breathing, I was wheezing, I was coughing. I'd stand in the apartment and hack all the time, I was coughing."[11] When claimant reported her problems to Dr. Prendes he referred her back to a pulmonary physician. Claimant said she complained to her employer about the effect the Clorox cleaner was having on her but she could not convince them to let her stop using the product. Eventually, on April 11, 1995, claimant stopped working because of her breathing problems.

Claimant acknowledged that she had her own cleaning business in addition to the work she was doing with respondent. She described doing only light cleaning and denied using any ammonia, chlorine bleach or other products that would aggravate her condition. She quit doing work for her own side business about the same time she stopped working for respondent.

Claimant testified to sending a written claim form to respondent by certified mail the end of May 1995, and an Employers Accident Form was completed by respondent's manager, Sherri Farris, dated June 5, 1995.[12] Thereafter, claimant received a letter from respondent's workers compensation insurance carrier dated August 10, 1995, informing her that her claim for workers compensation benefits was being denied.[13]

Claimant does not believe she is capable of performing a full time job. “I may be able to do a job two to three hours once or twice a week and then I have to rest or whatever.”[14] Her asthma makes her tired all the time. She is able to do chores around the house but even cooking makes her tired and short of breath so that she will have to sit down. Claimant has attempted several temporary and part time positions but says she has been unable to work more than a few hours at a time on an occasional basis.

Timothy W. Smith, M.D., is board certified in internal medicine and in the sub-speciality of pulmonary disease with a special certification in critical care medicine. He

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[10] *Id.* at 15.

[11] *Id.* at 18.

[12] *Id.* Cl. Ex. 3.

[13] *Id.* Cl. Ex. 1.

[14] *Id.* at 41.

specializes in pulmonary disease and critical care medicine with Pulmonary Physicians of Kansas City, Inc. He began treating claimant on August 29, 2001. At that time her primary complaints were breathing difficulties which he said began in 1988 after working with lacquer thinners. She related thereafter being exposed to several cleaning substances off-and-on for an extended period of time. He diagnosed moderate persistent asthma. At the time of his December 5, 2003 deposition, Dr. Smith was still claimant's treating physician, having last seen her on November 4, 2003. She had also been to his office on December 1, 2003 for an injection. During the period of time he has treated her, he described her condition as relatively stable but at times she has had periods of significant difficulties. Pulmonary function testing revealed that her lung capacity was about 55 to 60 percent of normal. Dr. Smith said that the restriction in her lung capacity affects her ability to perform day-to-day activities. He acknowledged that certain airborne agents can affect asthma. It is characteristic of asthma to not only have specific allergic reactions but also to be more sensitive than the average individual to a number of non-specific irritants such as cleaning fluids. He described her condition as permanent although it is treatable with medications. Based upon the *Guides*[15] Dr. Smith said claimant fits into a Class 3 respiratory impairment which is a 26 to 50 percent impairment of the whole person. Dr. Smith considered this to be a minimum rating and said that at times she was in the Class 4 category which represented a 51 to 100 percent impairment. As to causation, Dr. Smith attributed claimant's pulmonary problem to her work-related exposure.

> A. (Dr. Smith) Based on the history that I obtained from her and the findings, it was my belief that her asthma was precipitated by exposure to the lacquer thinner and then subsequent exposure to cleaning solvents in the work place.
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> Q. (Mr. Kolich) Now, would the exposure to these materials, Doctor, create a hazard which would be in excess of what she would be exposed to in day-to-day ordinary living?
>
> A. Yes. [16]

Dr. Smith said her prognosis was fair. Her condition was not under as good of control as he would like and there were going to be times when she would have greater difficulties. In his opinion, she was completely disabled from her previous employment but, "there may be some simple sedentary task that she may be able to do if she avoids an environment without solvents, without extreme changes in temperatures, without things that would trigger her asthma. . . ."[17] With regard to restrictions, Dr. Smith said:

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[15] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[16] Smith Depo. at 17.

[17] *Id.* at 19.

> A. (Dr. Smith) Well, the first thing is I think there would need to be environmental restrictions where she is not exposed to strong fumes, odors, extremes in temperature, because all those things may make her asthma worse. In addition, I think because of her limited capacity there's going to have to be restriction on the amount of physical exertion she would do, including probably some lifting restrictions and also restrictions on the amount of exercise walking up stairs, that kind of thing.
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> Q. (Mr. Kolich) What type of weights do you believe she would be able to lift?
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> A. I would think that once she gets much above 15 pounds she's going to have trouble.
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> Q. How about even a lesser weight but on a repetitious basis?
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> A. I think that would be difficult too. Her endurance is going to be limited, I believe, because of her asthma. In other words, she may be able to pick up something of 15 pounds once but if she had to do it over and over again throughout the day, that might be difficult for her.[18]

Dr. Smith said that it is pretty well accepted in pulmonary medicine that ammonia type compounds and chlorine type compounds can be respiratory irritants and, in high enough doses, can cause airway injury and induce asthma. Dr. Smith described asthma as a subset of chronic obstructive pulmonary disease (COPD). COPD is the general term that includes chronic bronchitis, emphysema and asthma. However, the AMA Guidelines are based upon fixed airway obstruction whereas in claimant's case it is a combination of a fixed component and a reversible component. Dr. Smith described claimant's asthma as following into a sub-category of reactive airway dysfunction syndrome (RADS) where there is an initial exposure brought on by a large one-time exposure to an irritant or chemical with subsequent exposures that may cause the condition to worsen. When asked whether claimant had multiple chemical sensitivity, Dr. Smith answered:

> A. (Dr. Smith) I don't know the answer to that one, to tell you the truth. I mean, I think the history that I got was that she's had an asthmatic sort of problem and she has a sensitivity and because of her asthma irritants bother her more.[19]

Gerald R. Kerby, M.D., is board certified in internal medicine, with a sub-speciality in pulmonary disease and critical care. He is a professor with the Pulmonary and Critical Care Division of the Department of Internal Medicine at the University of Kansas Medical Center. Dr. Kerby saw claimant on only one occasion for a court ordered independent

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[18] *Id.* at 19 and 20.

[19] *Id.* at 44 and 45.

medical examination. In his opinion claimant has a genetic atopy which is a genetically transmitted disease where the person tends to form IgE class antibodies when exposed to environmental antigens. The "manifestation of that can be in the skin, in a skin rash called eczema; it can be in the nose as allergic rhinitis, which in lay terms is hay fever; or in the lung it can be asthma."[20]

Dr. Kerby indicated that the products claimant said she was exposed to at work, including the chlorine bleach, the solvents and lacquer thinners are not antigens and would not have caused her asthma. Although Dr. Kerby did not think that claimant's occupational exposure caused her asthma, he did think it made her asthma worse.

> A. (Dr. Kerby) Basically, that she developed asthma in about 1988 or '89. She has a family history of atopy, and she also has a history of developing allergic rhinitis, and on exposure to pollen, so she is also atopic.
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> Atopic people tend to develop asthma at some point in their life, it can be at childhood, it can be at adolescence, it can be at adult age. With asthma the solvents and cleaning solutions to which she was exposed act as non-specific irritants and do increase the symptoms of asthma. Anyone with asthma will usually react with increased symptoms when exposed to any inhaled irritant.
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> Therefore, it was my opinion that there were two factors which caused her asthma. She was not exposed to anything which is an allergen, or a sensitizing, so I don't think her asthma was caused by occupational exposure, but I think it was made somewhat worse by the exposure than it would have been otherwise.[21]

Dr. Kerby indicated that the exposure at work could be a temporary aggravation or it could result in permanent pathologic changes in the airway. Asthmatics that have more frequent symptoms are more likely to end up with permanent changes in their airways than those that have symptoms only infrequently. In his opinion claimant would be in the Class 2 under the *Guides* for a 20 percent impairment. Because claimant had a greater number of flare-ups of her asthma symptoms due to work exposure, Dr. Kerby "thought it was fair to assign some causation to those exposures in her permanent impairment."[22] Accordingly, he assigned half of the 20 percent impairment rating to the work exposure and half to her genetic predisposition.

Neither Dr. Smith or Dr. Kerby were given the history of claimant operating her own cleaning business contemporaneous with her employment with respondent. When given this history during their depositions, both indicated that claimant's self employment could

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[20] Kerby Depo. at 5.

[21] *Id.* at 6 and 7.

[22] *Id.* at 9.

likewise have contributed to her condition, although neither placed a number or attempted to apportion the respective contribution. Although Dr. Kerby indicated that the type of activities claimant performed in her own cleaning business and the products she used could also have been low grade irritants, Dr. Smith seemed to focus on the chlorine and ammonia products which claimant said she only used while working for respondent. Claimant denied using lacquer thinner, chlorine bleach or ammonia in her own cleaning business. Claimant said she only used milder soaps and detergents which did not bother her nor cause her asthma to become symptomatic. Dr. Kerby acknowledged that if claimant was not experiencing symptoms from the products she was using in her self employment, then those cleaning agents and activities were probably not a factor in her airway damage and permanent impairment rating.[23]

Claimant's asthma was the basis for Dr. Kerby's recommended restrictions that limited her to "mild degrees of exertion in a clean environment that would be free of respiratory irritants and extremes in temperature."[24] When asked his opinion concerning claimant's loss of ability to perform the job tasks she performed during the 15 years before her accident, Dr. Kerby said that claimant could basically do all of the tasks to a "mild degree and the environmental conditions have to exclude toxic chemicals, irritant conditions, extreme cold and extreme heat."[25] By extreme temperatures Dr. Kerby explained that he meant ordinary room temperatures plus or minus 20 degrees. Also, she should avoid "anything that will make her eyes water, make her sneeze, make her throat burn and make her wheeze."[26] Dr. Kerby did not place any specific restrictions on claimant's level of exertion other than saying she could perform tasks "to a mild degree."[27] But when pressed he explained that she could walk at an ordinary pace for several blocks but could not walk fast, she could probably climb "a flight of stairs or so. She could probably stand more or less indefinitely."[28] As to lifting he would say "20 pounds or so would be reasonable."[29] All of these restrictions assume that claimant is in an environment free of respiratory irritants and that does not flare her asthma.

Dr. Kerby said that he does not use the antibody IgE injections to treat his asthma patients because they are not very potent and because of the expense. He acknowledged

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[23] Kerby Depo. at 21.

[24] *Id.* at 12.

[25] *Id.* at 13.

[26] *Id.* at 14.

[27] *Id*. at 18.

[28] *Id.*

[29] *Id.* at 19.

that those injections are approved by the Federal Drug Administration (FDA) for treatment of asthma but he did not consider them to be a generally accepted treatment.

As noted above, claimant presented this claim as either an injury caused by a series of accidents or as an occupational disease. Although this case presents elements of both a series of accidental injury and an occupational disease, the ALJ concluded that as with repetitive trauma conditions like carpal tunnel syndrome, this claim is compensable as an accidental injury. The Board agrees. In *Berry*, the Kansas Court of Appeals (Court of Appeals) said:

> In the final analysis, whether carpal tunnel syndrome is a personal injury caused by accident or an occupational disease is nothing more than an interesting issue of semantics. We conclude that we need not decide that question . . . . The fact is carpal tunnel syndrome appears to be a hybrid condition that is neither fish nor fowl. It is a condition caused by repetitive trauma over a long period of time. . . . We hold that carpal tunnel is a condition that cannot logically be said to be either a personal injury caused by accident or occupational disease. . . . It is a condition that lies somewhere between a personal injury caused by accident and an occupational disease.[30]

But in *Armstrong*,[31] the Court of Appeals held claimant's multiple chemical sensitivity condition that resulted from a single exposure was an occupational disease.

The permanent partial disability rating is determined by the formula applicable to an "unscheduled" injury as set forth in K.S.A. 44-510e(a), which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

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[30] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 227-230, 885 P.2d 1261 (1994).

[31] *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

But that statute must be read in light of *Foulk*[32]and *Copeland*.[33] In *Foulk,* the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the above quoted statute's predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held that for purposes of the wage loss prong of K.S.A. 44-510e(a), the worker's post-injury wages should be based upon his or her ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[34]

The term "good faith" does not appear in the Workers Compensation Act and, therefore, there is no statutory definition for that term. The Kansas Appellate Courts have indicated that good faith should be determined on a case-by-case basis.[35]

The Board finds claimant is capable of engaging in substantial gainful employment. She is not totally disabled. Accordingly, she is required to make a good faith effort to find appropriate employment. She has failed to do so. Therefore, a wage will be imputed to her based upon her ability to earn wages taking into consideration her age, education, experience, restrictions and physical limitations. The Board concludes she is able to do sedentary and very light duty work such as described by respondent's vocational expert, Mr. Terry Cordray. In those jobs she would likely earn an average weekly wage of at least 90 percent of the average weekly wage she was earning at the time of her injury. Accordingly, claimant's permanent partial disability award is limited to her percentage of functional impairment. The Board is mindful of claimant's testimony that she is unable to work full-time and of the testimony of claimant's vocational expert, Mary Titterington. Nevertheless, no physician restricted the number of hours claimant should work and no physician said she could not perform sedentary employment in an appropriate environment.

As for the percentage of claimant's functional impairment, the Board gives approximately equal weight to the opinions of both the treating physician, Dr. Smith, and

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[32] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091(1995).

[33] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[34] *Id.* at 320.

[35] *See Hanson v. Logan U.S.D. 326,* 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000); *Oliver v. Boeing Co.,* 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

to the court appointed expert, Dr. Kerby, and finds claimant's permanent impairment of function is 29 percent.

The Board further finds that the treatment provided by Dr. Smith, including the injections, has been reasonable and appropriate. Dr. Smith is to continue as claimant's authorized treating physician until such time as respondent provides claimant with a list of three (3) qualified physicians in the field of internal medicine, pulmonary medicine or allergy and immunology from which claimant may select one to be her authorized treating physician.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of September 14, 2004 entered by Administrative Law Judge Kenneth J. Hursh should be modified as follows:

The claimant is entitled to 120.35 weeks of permanent partial disability compensation at the rate of $218.29 per week or $26,271.20 for a 29 percent functional disability, making a total award of $26,271.20.

As of September 27, 2004, there would be due and owing to the claimant permanent partial disability compensation at the rate of $218.29 per week in the sum of $26,271.20 for a total due and owing of $26,271,20, which is ordered paid in one lump sum less amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September 2004.

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BOARD MEMBER

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BOARD MEMBER

Dissenting and Concurring Opinion

While the undersigned Board Member agrees with the majority position that this claim represents a personal injury by accident, the undersigned would find the claimant to be permanently and totally disabled and would award compensation based on permanent total disability.

The claimant is a 61 year old employee with a relevant 15-year work history involving primarily strenuous physical activity employment. According to the treating doctor, Dr. Smith, her breathing capacity is 55 percent to 60 percent of what it should be. The evidence reflects that she suffers from chronic fatigue, and that she has to stop and catch her breath after climbing only a few stairs. Dr. Kerby and Dr. Smith both placed significant restrictions on the claimant, including Dr. Kerby's restriction of avoiding temperatures more than 20 degrees above and below room temperature, which would certainly be a significantly limiting factor in Kansas. Claimant's vocational expert, Mary Titterington, testified that in her opinion due to restrictions from the doctors, as well as the claimant's emotional lability due to frightening feelings claimant exhibits due to the shortness of breath, difficulty breathing, and fatigue that comes on due to the shortness of breath, that claimant was realistically not employable. The evidence from the doctors, as well as Ms. Titterington, support the conclusion that considering the claimant's age, education, work history, and physical limitations, claimant is completely and permanently incapable of engaging in any type of substantial and gainful employment. This is further supported by the finding of the Social Security Administration which found the claimant to be permanently and totally disabled for social security disability purposes. It strikes the undersigned as inconsistent to find the claimant to have not exhibited "good faith" to find appropriate employment, when she has been found by another administrative agency to be permanently and totally disabled and unable to engage in substantial and gainful employment. Accordingly, the undersigned would find the claimant to be permanently and totally disabled and would award benefits accordingly.

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BOARD MEMBER PRO TEM

Dissent

Although it contains elements of both, the undersigned Board Members would find this claim to be an occupational disease rather than a personal injury by accident.[36] The primary significance between a claim for occupational disease and a claim for personal injury by accident is the method for measuring disability.[37] With an occupational disease there can be an apportionment between occupational versus non-occupational factors, where both occupational and non-occupational factors contribute to the disability even without a pre-existing impairment. Whereas with an injury by accident, even where there is a showing of a pre-existing condition, the respondent must show that the pre-existing condition constituted an impairment before receiving a credit against the permanent partial disability award.[38] The undersigned Board Members otherwise agree with the findings, conclusions and orders of the majority, including the findings regarding the nature and extent of claimant's disability under K.S.A. 44-510e, if this claim is to be compensated as a personal injury by accident rather than an occupational disease.

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BOARD MEMBER

_____
BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
J. Paul Maurin, Attorney for Claimant
James K. Blickhan, Attorney for Respondent and its insurance carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[36] *See Armstrong supra*.

[37] *See* K.S.A. 44-5a01 and K.S.A. 44-5a06.

[38] *See Hanson supra*.